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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 342

MADISON L. MILLER, JR., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 22–27) is reported in 71 F. (2d) 361.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1934 (R. 27). The petition for a writ of certiorari was filed September 4, 1934, and a motion to proceed in *forma pauperis* was granted October 15, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judi-

cial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where the evidence in a war-risk insurance suit fails to establish the existence of a total permanent disability in fact, is the insured entitled to recover if he can show anatomical or functional losses sufficient to create a presumption of total permanent disability for compensation purposes under the provisions of subdivision 3, Section 202, World War Veterans' Act, as amended.

2. Is a regulation making the provisions of the above section applicable to insurance awards authorized by law?

3. Did the trial court properly direct a verdict for the United States in this case?

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra,* pp. 12–15.

STATEMENT

The petitioner brought suit on April 5, 1932, in the District Court of the United States for the Middle District of Georgia to recover total permanent disability benefits under a contract of war risk term insurance issued to him during his service in the United States Army (R. 1–3). While it was admitted that no premiums had been paid since petitioner's discharge, April 3, 1919 (R. 1–2), it was alleged that the petitioner became totally and permanently disabled on October 26, 1918, as a result

of injuries sustained in the wreck of a troop train in France (R. 2). The loss of the right arm and of the sight of the left eye were alleged (R. 2), but from the evidence adduced at the trial it appears that the petitioner's vision had been defective since birth (R. 15). This condition while permanent had apparently not disabled him, or even been noticed by him, prior to the time he received the injury which resulted in the loss of his right arm (R. 12, 23, 26). Neither was it mentioned in his application for life insurance in 1919 after his discharge from the service (R. 14).

Before entering the Army the petitioner had received the equivalent of three years of a high-school education and had worked as a practical engineer engaged in surveying (R. 12–13). Except for the loss of his right arm and the defective vision in his left eye, his health has always been good (R. 14, 23).

Since his discharge from the Army petitioner has received from the Government an average of about $90.00 per month as compensation, but had earned by his own efforts only $405.00 (R. 15). The petitioner testified to having attempted unsuccessfully to pursue several forms of employment, but in some instances the work was of a character incapable of being accomplished by a one-armed man, and he abandoned employment as a salesman on other occasions because he found he had no talent for the work (R. 13–14).

A medical witness, who qualified as an eye specialist, testified that petitioner's vision in his left

eye was only about one-tenth of normal, but that if the sight of the right eye should be lost there would be sufficient vision in the left eye to enable the petitioner "to get around." The witness expressed the opinion that the petitioner was under a special handicap, because he had to direct his left hand with his right eye, and stated that he did not know of any gainful occupations that petitioner could follow (R. 15–16). The only other witnesses for the petitioner testified merely to having witnessed the train wreck and petitioner's injuries therein (R. 16).

Upon conclusion of the petitioner's evidence the trial court directed a verdict for the United States (R. 17). An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, in which court the contention was made for the first time that, irrespective of the existence of total permanent disability in fact, recovery should have been allowed under subdivision 3 of Section 202, World War Veterans' Act, as amended (*infra,* p. 13), and pursuant to Veterans' Administration Regulation No. 3140 (*infra,* p. 14), which adopted for insurance awards the provisions of Section 202 that certain anatomical and functional losses, among them the permanent loss of the use of one hand and one eye, should be deemed for compensation purposes to be total permanent disability.

The Circuit Court of Appeals held the statutory provision not applicable on the ground that it related solely to compensation and also ruled that

Regulation No. 3140 was not binding on the courts as it constituted "a modification or enlargement of the insurance contract" provided for by Congress (R–25). It was also held that, "Regulations aside, the evidence did not warrant a finding of total permanent disability", as the petitioner was not totally disabled in fact (R–25).

DISCUSSION

In *Lumbra* v. *United States*, 290 U. S. 551, 558–560, this Court indicated that it was of the view that the Congressional authorization for war-risk insurance against "total permanent disability" contemplated that the condition must exist in fact to warrant payment of the benefits provided.

The petitioner herein contends for an enlarged liability to include what may be termed presumptive total permanent disability. His contention is bottomed on the statutory provision that loss of certain members or functions shall constitute total permanent disability for compensation purposes.[1]

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[1] The War Risk Insurance Act of October 6, 1917, contained a provision in Section 302, "That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month." This provision has been enlarged from time to time so that statutory total permanent disability for compensation purposes is now allowed for "the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden

It is, therefore, urged by him that since he suffered the amputation of his right arm in October 1918 while his insurance was in force and at that time also had an impaired vision in one eye, his case is controlled by the statutory provision which included among the conditions enumerated the permanent loss of the use of one hand and one eye. That this contention is clearly without merit is evident from the following quotation from the opinion of the Circuit Court of Appeals (R. 25):

> The statutory provision * * * has no application to War Risk Insurance. It was an amendment to a section in Art. III of the Act of 1917 relating to compensation for disabilities contracted in the line of duty, and reappears in Part II of the Veterans Act of 1924 devoted to that subject. Separate parts of both statutes are devoted to the contract of insurance, where the disability insured against may arise at any time or from any source. The statutory provision refers also to "double total permanent disability" for compensation purposes, whereas there could be no such thing for insurance purposes. Things that Congress has directed shall be deemed total permanent disability as respects the compensation benefits volun-

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* * *." The enlargements of this provision are contained in the amendatory Acts of June 25, 1918; August 6, 1919; December 24, 1919; June 7, 1924; and July 7, 1926. For a complete legislative history of the provisions, see "Federal Laws Relating to Veterans of Wars of the United States" (annotated), 72d Congress, First Session, Report No. 131, p. 132.

tarily bestowed by the Government do not fix the Government's legal liability on its insurance contracts.

Petitioner also relies upon Veterans' Administration Regulation 3140 which provides that the anatomical and functional losses enumerated in the statute dealing with compensation shall likewise constitute total permanent disability for war risk insurance purposes. The Circuit Court of Appeals held the regulation not binding in litigation on war risk insurance on the ground that it constituted an unauthorized modification or enlargement of the insurance contract.

This view we believe to be correct. In addition to the reasons expressed in the opinion of the Circuit Court of Appeals indicating that Congress did not intend to vest the Director with authority to enlarge by regulation the Government's liability for insurance against permanent and total disability, it may be pointed out that when the War Risk Insurance Act of October 6, 1917, was being considered by Congress the House Committee having charge of the Bill struck out a clause originally contained in Section 402 which would have provided that "rights and privileges not provided for may be granted from time to time as may be prescribed by regulations." See H. R. Report No. 130, Part 3, 65th Congress, First Session.

A Veterans' Bureau regulation which, as in the one involved here, provided for insurance awards of total permanent disability in cases not neces-

sarily involving such disability in fact, was held invalid by the Comptroller General of the United States on the ground that it exceeded the legal authority of the Director. 1 Decisions Comp. Gen. 31. The regulation there in question sought to establish permanent and total disability in insurance cases conclusively by lapse of time alone without regard to the actual facts. Concerning this regulation, the Comptroller General said (p. 32):

> * * * Any general regulation of the matter, however, must under the terms of the statute be not inconsistent with its provisions, so that in my opinion any such regulation which undertakes, for instance, without specific authority of law, to establish a general rule for rating total permanent disability upon mere lapse of time and without regard to whether the applicant was in fact totally and permanently disabled, is contrary to law and therefore of no effect as a general regulation * * *.

The decision further said (p. 32):

> As regards the application of these regulations to the payment of insurance the situation is not materially different. The insurance provided for by section 400 of the act of October 6, 1917, 40 Stat. 409, is payable only in case of death or "total permanent disability", and may not lawfully be paid for any disabled condition which is not in fact permanently total according to the medical opinion and award of the bureau. As in the case of compensation the director

> is authorized and empowered by law to decide when a condition of permanent total disability exists. The same legal restriction upon his power to make general regulations which applies to compensation applies with equal force to insurance, and I cannot approve a regulation which undertakes to establish conclusively by lapse of time a condition of permanent disability which can be determined to exist only by competent medical opinion based upon the facts of any given case.

This decision was reaffirmed by the Comptroller General in 2 Dec. Comp. Gen. 99.

That the Congress concurred in the Comptroller General's ruling as to the illegality of such a regulation seems implicit in the fact that Section 27 of the World War Veterans' Act of June 7, 1924, validated payments made under awards disapproved by the ruling of the Comptroller General, but did not provide that any future payments might be made, and this action was taken upon submission by the Bureau to Congress of the facts relating to the regulation in question. Reference to the situation was contained in House Report No. 763, pp. 3, 12, and Senate Report No. 397, pp. 2, 6, 68th Congress, First Session.

It may be suggested in this connection that had Congress not concurred in the ruling of the Comptroller General, it could very well have provided by the same amendatory legislation that the Director should be empowered to promulgate such a

regulation as was held invalid, and the failure of Congress so to do is to be taken as evidencing a contrary intent. *Girard Trust Co.* v. *United States*, 270 U. S. 163, 169.

Because there is some indication in the opinion of the court below that the evidence may have been regarded as not tending to establish the loss of eyesight contemplated by the regulation (R. 25–26), a view may be taken of the case that the decision insofar as it relates to the invalidity of the regulation is *dictum*. If that be so, then there is presented only the question whether there was evidence warranting submission of the case to the jury, a question which, of course, would not justify review here. But the opinion is also susceptible of the interpretation that the court felt it necessary to pass upon the validity of the regulation because it considered that there was merit in the contention of the petitioner that his disability came within the purview of the regulation. To us this seems the more reasonable interpretation of the opinion, and in this light it cannot be said that the case is not of sufficient importance to warrant review on writ of certiorari. A provision similar to the regulation involved is contained in converted insurance contracts, of which there are some 600,000 in force (see Regulations 3122, *infra*, p. 14), and we are informed that the Veterans' Administration is continuing to apply these regulations for the purposes of administrative adjudication and awards, both in term and converted insurance cases.

For the reasons stated we do not oppose the granting of the petition.

Respectfully submitted.

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NOVEMBER 1934.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

This section was restated in substance in subsequent amendments (U. S. C., Title 38, Sec. 511; U. S. C. Sup. VII, Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918,[1] "permanent and total disability" was defined as follows:

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[1] This regulation was promulgated by the Director of the Bureau of War Risk Insurance pursuant to the authority contained in Section 13 of the War Risk Insurance Act (added by Section 2 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 399).

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Section 202 (3) of the Act of July 2, 1926, c. 723, Sec. 9, 44 Stat. 790, 794 (U. S. C., Title 38, Sec. 473), provides in part as follows:

> If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month: *Provided, however,* That the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability: *Provided further,* That the compensation for the loss of the use of both eyes shall be $150 per month, and that compensation for the loss of the use of both eyes and one or more limbs shall be $200 per month: *Provided further,* That for double total permanent disability the rate of compensation shall be $200 per month.

Section 202 (4) of the Act of June 7, 1924, c. 320, 43 Stat. 607, 618 (U. S. C., Title 38, Sec. 477), dealing with compensation for disabilities attributable to military service, provides:

* * * * *

> A schedule of ratings of reductions in earning capacity from injuries or combinations of injuries shall be adopted and applied by the bureau. Ratings may be as high as 100 per centum. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury. * * *

Regulation 3140 of the Veterans' Administration provides as follows:

> Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under yearly renewable term insurance. Monthly installments of insurance, or any of these specifically enumerated causes of total permanent disability, shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

Veterans' Administration Regulation 3122 makes exactly similar provisions with respect to United States Government life insurance.

Regulation 3205 of the Veterans' Administration provides as follows:

> RATINGS FOR INSURANCE BENEFITS NOT APPLICABLE FOR DISABILITY COMPENSATION OR DISABILITY ALLOWANCE.—Since decisions of the insurance claims' council determining the existence or nonexistence of total and permanent disability for insurance purposes and decisions of rating agencies determining the existence or the nonexistence of total and permanent disability for compensation or disability allowance purposes are based upon distinctly dissimilar standards, it follows that the former cannot be determinative for compensation or disability allowance purposes and the latter cannot be determinative for insurance purposes. (November 1, 1931.)

U. S. GOVERNMENT PRINTING OFFICE, 1934